

or duty . . . whether or not the discretion involved be abused".<sup>5</sup>

<sup>5</sup> For a recent case applying this section see *Coates v. United States*, 8 Cir, 181 F2d 816.

What we have here said makes it unnecessary to consider this further contention.

The judgment is reversed, with directions to enter judgment for the United States.

### ANNOTATION

**Federal Tort Claims Act provision excepting from coverage claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, etc.**

[See ALR Digests, United States § 12.]

This annotation deals exclusively with cases arising under 28 USC § 2680 (h), one of the 12 subsections containing exceptions from coverage of the Federal Tort Claims Act, which provides that: "The provisions of this chapter and section 1346 (b) of this title shall not apply to — . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

For a general discussion of the Federal Tort Claims Act, see the annotation in 1 ALR2d 222. For other related annotations, see Federal Tort Claims Act: construction of provision excepting claims involving "discretionary function or duty." 19 ALR2d 845. Construction and application of exemption provisions of Federal Tort Claims Act—Federal cases. 94 L ed 9.

Although this section covers a wide variety of circumstances under which the Federal Tort Claims Act shall not be applicable, there are very few cases in which it has been applied or discussed. The cases which have arisen under it, however, furnish an indication of the extent to which coverage has been denied, ranging from assault to interference with contract rights.

In *Rice v. United States* (1949) 85 App DC 404, 179 F2d 26, a judgment for the defendant was reversed and the case remanded for a new trial on the appellate court's finding that the

story of the engineer and fireman of a train operated by the government, to the effect that the injured plaintiff fell from the car on which he was stealing a ride when the car ran close to a bank, was disproved by other evidence, and that the story told by the plaintiff and his companions, to the effect that the plaintiff fell from the car when he was kicked by the engineer, was unimpeached. Although the action was brought under the Federal Tort Claims Act, and would seem to be barred by the provision excepting from coverage claims arising out of assault and battery, assuming the injury to have occurred in the manner described by the plaintiff and his witnesses, this point was not raised in the decision.

A judgment for the plaintiff against the United States was reversed in *United States v. Hambleton* (1950, CA9th Wash) 185 F2d 564, 23 ALR2d 568, revg (DC) 87 F Supp 994, where the plaintiff had been brought to a psychotic condition, characterized by loss of memory and persecutory delusions, requiring sanitarium treatment, as a result of interrogation for a period of three and a half hours by a sergeant assigned to the Army's Criminal Investigation Division, who allegedly subjected her to repetitive questions and statements on "delicately personal subjects not directly connected with the investigation he was conducting," although it appeared that the plaintiff never felt herself under any threat of force or violence and

† Consult ALR2d BLUE BOOK SERVICE for cases subsequent to publication date †

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no threats were made, and the sergeant was not asked at any time to leave the premises. After noting that under Washington law there could be no recovery for mental suffering or emotional distress which was caused by mere negligence of the defendant, although recovery was permitted for similar acts which were wilful, in line with the modern trend which includes within the definition of assault the intentional causing of severe emotional distress to another, and stating that the latter meaning of the word "assault" must have been intended by Congress in formulating the exceptions contained in § 2680 (h), the court added: "In its finding the [trial] court did not distinctly characterize Anderson's acts as either wilful, or negligent. We think such omission unimportant, for, as we have seen, if the acts were merely negligent, the Washington law gives no remedy, while if they were wilful, the acts constituted an assault within the meaning of the excepting clause of the Tort Claims Act."

In dismissing an action for damages brought against 37 special agents of the Federal Bureau of Investigation, alleging false imprisonment and illegal search and seizure in violation of rights guaranteed under the Fourth and Fifth Amendments of the Constitution of the United States, the court in *Bell v. Hood* (1947, DC Cal) 71 F Supp 813, held that there could be no right of action unless the federal officers had exceeded their authority, in which case they no longer represented the government and hence lost the protection of sovereign immunity from suit but could not be held liable as individuals since the prohibitions of the Fourth and Fifth Amendments do not apply to individual conduct, and cited § 2680 (h) in support of its conclusion that the federal government had never consented to be sued for damages resulting from invasion of the rights protected by the Fourth and Fifth Amendments, even in cases where such torts were committed by a federal officer while acting within the scope of his office or employment.

In sustaining the government's de-

murrer to a petition seeking damages for illegal imprisonment on the finding of the court that the petition lacked necessary allegations to come within a statute which rendered the United States liable under certain circumstances if it was shown that a person was not guilty of a crime for which he was convicted and imprisoned, the court in *Ekberg v. United States* (1948) 110 Ct Cl 267, 76 F Supp 99, pointing out that the petition appeared to state an instance of false arrest and imprisonment in connection with which jurisdiction had not been given to the Court of Claims, added: "While Congress has given original jurisdiction to the District Courts of the United States to hear tort cases in limited situations, even there it has excluded actions for false arrest and imprisonment."

The government's exceptions to a petition by the respondent to implead the United States were sustained in *Denahey v. Isbrandtsen Co.* (1948, DC NY) 80 F Supp 180, where the plaintiff alleged that he had been taken into custody by military authorities while ashore in Japan, on complaint of the master of his ship, who subsequently sailed without him, and that he had been later released by the military authorities with all charges withdrawn, the court holding that the Federal Tort Claims Act did not apply since § 943 (h) [now 28 USC § 2680 (h)] expressly excepted any claim arising out of "false imprisonment, false arrest, or malicious prosecution."

It was contended in *Nicholson v. United States* (1949, CA5th Ga) 177 F2d 768, that the plaintiff could not recover from the government for damages allegedly caused by a fire resulting from the negligence of prisoners of war of the United States and their guard while they were working for the plaintiff on his premises under a written contract with the United States for their labor, on the ground that the Federal Tort Claims Act excluded from its provisions all controversies over contracts and rights arising thereunder or in connection therewith, including claims for damages sound-

ing in tort. In reversing a judgment for the defendant, the Court of Appeals held that the provision of the Tort Claims Act § 2680 (h) had nothing to do with claims of the sort asserted in this case, that is, torts committed by persons sustaining contract relations, but was confined exclusively to the tort described, "interference with contract rights."

The district court's action in sustaining the defendant's motion to dismiss the complaint was reversed in *Oman v. United States* (1949, CA10th Utah) 179 F2d 738, where the plaintiff alleged that government employees, in charge of grazing activities on the public domain, wrongfully aided, allowed and encouraged other livestock operators to use the public domain, upon which the defendant had previously granted exclusive grazing privileges to the plaintiff based on the plaintiff's ownership of adjacent private lands, and the plaintiff further alleged that the government agents, despite representations that they would cancel privileges granted to plaintiff's predecessors in title, had refused to do so and had instead, with intent to injure plaintiff's operations, permitted and directed the plaintiff's predecessors and others to use such grazing lands. Although the appellate court cited that part of § 2680 (h) which bars any claim arising out of "misrepresentation, deceit, or interference with contract rights," and implied that the claim arising out of misrepresentation would be barred by this section, the opinion contains no discussion as to whether the acts complained of would constitute "interference with contract rights" within the meaning of the section, the principal point of discussion being whether the

agents, in committing the acts complained of, were acting within the course and scope of their employment, the court holding that this should be determined after a full disclosure by evidence of the pertinent facts rather than upon the bare allegations of the pleading.

In *Gubbins v. United States* (1951) — App DC —, 192 F2d 411, where the plaintiff firm claimed damages of \$5,000,000 because its name had been placed on a "Proclaimed List of Certain Blocked Nationals," as a result of which its trade was paralyzed and its good name "ruined and besmirched in trading circles throughout the world," dismissal of the action was upheld under § 2680 (e), barring claims arising out of administration of the Trading with the Enemy Act, the court adding that it was pertinent to note that the Tort Claims Act also excepted actions founded on libel.

Section 2680 (h) was cited by the appellate court in *Anderson v. United States* (1950, CA1st Mass) 182 F2d 296, in which the government had brought an action to recover the balance due upon an F.H.A. note, and the defendant had filed a counterclaim alleging "that through his refusal to meet the demands of the agents of the plaintiff for bribes, blackmail and the falsification of records," he had suffered damage by reason of inadequate rents being set for his property, the court commenting: "We may doubt the liability of the United States for blackmail by an agency official, cf. 28 U. S. C. A. §§ 1346 (b), 2680 (h), but can hardly reach the question upon so incoherent a statement which fails to disclose a 'claim for relief,' as required by F. R. 8 (a)."

W. J. Dunn.

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